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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 492

WILLIAM B. CROSS, *Petitioner;*

vs.

M. R. PASLEY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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WILLIAM B. CROSS, *Petitioner*,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, William B. Cross, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on September 2, 1959, as modified on September 22, 1959.

OPINIONS BELOW.

The opinion of the United States District Court for the Western District of Missouri, Western Division, dated March 25, 1958, is not reported but is set out in the printed record, pages 3-9. On June 8, 1959, the United States Court of Appeals for the Eighth Circuit filed an opinion, reported in 267 F.2d 824, directing the District Court to make additional findings of fact and conclusions of law. On August 13, 1959, the District Court filed additional findings and conclusions, which are not reported but which are set out in the Appendix, *infra*, p. A21. On September 2, 1959, the said Court of Appeals filed an opinion which is not yet officially reported but which is set out in the Appendix, *infra*, page A5. Pursuant to a petition for rehearing, the said Court of Appeals filed a supplemental opinion, dated September 22, 1959, which is not yet reported but which is set out in the Appendix, *infra*, page A18.

JURISDICTION.

The judgment sought to be reviewed herein was dated and entered September 2, 1959. A petition for rehearing was filed by petitioner and the court below entered an order, dated September 22, 1959, denying the petition for rehearing but modifying the order dated September 2, 1959. On September 25, 1959, the court below stayed its mandate for a period of thirty days for the purpose of permitting the filing of this petition for writ of certiorari.

Jurisdiction is conferred on this court by 28 U.S.C., Section 1254.

QUESTIONS PRESENTED.

1. Where the owners of undivided interests in oil leases entered into a Joint Operating Agreement containing all the elements and attributes of a joint adventure between them, does a stipulation therein that the agreement shall not be deemed a joint adventure override all the other provisions and establish as a matter of law that there could be no joint adventure?

2. Where the parties have agreed that a specified amount of the investment by each shall be allocated to his acquisition of an undivided interest in an oil leasehold and that the balance of such investment shall be allocated to development expenses, and the parties report income taxes in accordance with said allocation, can the respondent thereafter in a suit under the Missouri Securities Law (based on non-registration of the sale of the leasehold interest) recover the aggregate amount paid by him, or is he limited to recover only the portion allocated by the agreement as payment for his leasehold interest?

3. When Missouri decisions uniformly hold that a "tender" requires tender of physical delivery, may a Federal court, in deciding a case under the Missouri Securities Law, ignore said Missouri decisions merely because said decisions were not decided under said statute, and proceed to hold that a tender under the Missouri Securities law does not require any tender of actual delivery of an executed document re-assigning the real estate interests involved?

4. Is respondent estopped to recover back his investment where he invested with petitioner in three oil wells, all of which proved commercially unsuccessful, and thereafter he invested with petitioner in two more oil wells,

which likewise proved unsuccessful, and thereafter he invested with petitioner in a sixth oil well, which likewise proved unsuccessful, and thereafter he invested with petitioner in two additional oil wells which likewise proved unsuccessful, and thereafter he invested with petitioner in still a ninth oil well, and respondent made no claim for a return of any part of his investment until after all costs had been incurred and after the final result of all drilling was known and the value of all leaseholds had thereby become greatly depreciated, and where petitioner had not practiced any misrepresentation, concealment or fraud of any kind?

5. In this case involving the construction of a Missouri statute in respects not previously passed upon by the Missouri courts, should the court below have withheld its decision pending decision of a companion case by the Missouri Supreme Court involving the identical transactions; and if the Missouri Supreme Court in said companion case now under advisement decides contrary to the court below, should this court reverse the court below so as to make the result in this case consistent with the state law?

STATUTE INVOLVED.

This case involves the interpretation of the Missouri Securities Law (commonly referred to as "Blue Sky Law"), Chapter 409, R.S.Mo. 1949. The portions of that statute with which this case is concerned are as follows:

Sec. 409.020(3), R.S.Mo. 1949 provides:

> "The term 'security' or 'securities' means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or par-

ticipation in any profit-sharing agreement; collateral trust certificate; preorganization certificate, receipt, or subscription; transferable share; investment contract; voting trust certificate; certificate of deposit for a security; fractional undivided interest in oil, gas, or other mineral rights; beneficial interest in or title to property or profits; any certificate, contract, receipt or instrument whatsoever representing or constituting evidence of, or secured by, title to or interest in any oil, gas or mining lease, royalty, or deed, and interest, units or shares in any such lease, royalty, or deed; or, in general, any interest or instrument commonly known as a security, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of the foregoing; provided, however, that the term 'security' or 'securities' shall not include any stock, scrip or other certificate of interest heretofore or hereafter issued by any building and loan association or savings and loan association incorporated under the laws of this state or of the United States and subject to examination, supervision and control by either or both."

Section 409.030, R.S.Mo. 1949, provides:

"No securities except of a class exempt under any of the provisions of section 409.040 hereof or unless sold in any transaction exempt under any of the provisions of section 409.050 hereof shall be sold within this state unless such securities shall have been registered by notification or by qualification as herein defined. Registration of stock shall be deemed to include the registration of rights to subscribe to such stock if the notice under section 409.060 or the application under section 409.070 for registration of such stock includes a statement that such rights are to be issued."

Section 409.240, R.S.Mo. 1949, provides:

"Every sale or contract for sale made in violation of any of the provisions of this chapter shall be voidable at the election of the purchaser and the person making such sale or contract for sale and every director, officer or agent of or for such seller who shall have participated or aided in any way in making such sale shall be jointly and severally liable to such purchaser in an action at law in any court of competent jurisdiction upon tender to the seller in person or in open court of the securities sold or of the contract made for the full amount paid by such purchaser, together with all taxable court costs and reasonable attorney's fees in any action or tender under this section; provided, that no action shall be brought for the recovery of the purchase price after two years from the date of such sale or contract for sale; and provided further, that no purchaser otherwise entitled shall claim or have the benefit of this section who shall have refused or failed within thirty days from the date thereof to accept an offer in writing of the seller to take back the security in question and to refund the full amount paid by such purchaser, together with interest on such amount for the period from the date of payment by such purchaser down to the date of repayment, such interest to be computed:

"(1) In case such securities consist of interest bearing obligations at the same rate as provided in such obligations; and

"(2) In case such securities consist of other than interest bearing obligations at the rate of six per cent per annum; less, in every case, the amount of any income from said securities that may have been received by such purchaser."

STATEMENT OF THE CASE

This case was instituted by respondent under the Missouri Securities Law (commonly referred to as "Blue Sky Law"), Chapter 409, R.S.Mo. 1949, and also under the Federal Securities Act of 1933, to recover sums invested by him in a series of nine oil wells. The jurisdiction of the Federal District Court to determine whether the transactions were in violation of the Missouri Blue Sky Law was invoked because of diversity of citizenship and the amount involved. As to the alleged violation of the Federal statute, jurisdiction was invoked under 15 U.S.C., Sec. 77(v).

The facts concerning these investments are as follows: Petitioner and one Chasteen had acquired three leaseholds in southwest Kansas under the partnership name of C & C Petroleum Co. However, each of them had his principal business activities in fields other than oil and they were unable to finance the development of said leaseholds by themselves. They, therefore, sold three-fourths of the working interests therein to others. Respondent was one of such purchasers, and he agreed to take a 1/32d interest (R. 19). It was understood between all of the parties that C & C Petroleum Co. was to be the Operator and would have active management of the drilling. However, the Joint Operating Agreement (R. 23-49) signed by all parties with respect to each leasehold provided extensive rights and obligations upon each of the co-owners, including the right of a majority of the co-owners to discharge C & C Petroleum Co. as Operator at any time upon thirty days' notice. The Joint Operating Agreement also contained a stipulation that it should not be construed as creating a joint venture or other relationship whereby any party might be held liable for the acts

of any other party. The letter of confirmation (R. 19) with respect to the acquisition of the leasehold interests contained a similar stipulation. The various co-owners actually exercised the rights granted to them by the Joint Operating Agreement, and made pro rata payment of development costs as they were incurred.

At the time each investor acquired his leasehold interest, there was a written agreement under which an allocation was made of the consideration paid, a specific sum being allocated to acquisition of the leasehold interest and the balance being allocated to development costs (R. 20). In making out their Federal income tax returns, the investors treated said portion allocated to leasehold acquisition as their only capital investment, and the balance of the money paid by them was reported as deductible expense (R. 84, 87, 16-17). Formal assignments were made to each of the investors of their respective leasehold interests and those assignments were duly recorded (R. 21-23).

Test wells were drilled and completed on each of the three original leaseholds, and petitioner paid his share of the completion costs. All of those wells proved commercially unsuccessful, except that one of these wells did produce gas in quantities sufficient for commercial sale. After the first three wells had been completed and the results known, all of the investors, including respondent, agreed to the drilling of two additional wells on the same leaseholds (R. 56). With respect to each, petitioner paid his full share of expenses. Those two development wells proved unsuccessful. Thereafter various of the investors, including respondent, agreed to join in acquiring a fourth leasehold, called the Padgett lease (R. 101, 50). A well was drilled on said leasehold with respect to which petitioner paid his share of completion costs, but the

well proved unsuccessful. Thereafter respondent and others of the investors investigated two additional leaseholds in Oklahoma, known as the Jones and the Estate leases, and they then agreed with petitioner to join in the acquisition and development of those leases (R. 91, 77). Test wells were drilled on those leases with petitioner paying his share of completion costs, but both of those wells ultimately proved unsuccessful. Thereafter respondent and the other investors agreed to the drilling of an additional well on the Jones lease, in which petitioner paid his full share of expenses, but that well proved unsuccessful. With respect to all of these wells the same standard documents were used, consisting of a letter of conformation, a formal assignment of leasehold interest and a Joint Operating Agreement (R. 52, 53, 54, 82, 97). In each instance there was an allocation between leasehold costs and development costs (R. 54, 59, 83, 86, 89).

After all nine wells had been completed, all the money had been spent, and the various leaseholds had become less valuable, respondent decided he wanted his money back and brought this suit (R. 9). Both in his complaint and at the trial his counsel stated that respondent was tendering back whatever he had received, but respondent never offered any executed deed re-assigning the various leasehold interests which had been transferred to him. The trial court entered judgment in favor of respondent for the full amount which he had paid, without regard to the fact that the parties had allocated by their written agreement a much lesser sum as being the amount paid by respondent for his interests in the various leaseholds.

About the same time that respondent filed this case, others of the investors had filed similar cases in the state court. After the trial herein and after the appeal had been lodged in the court below, one of those companion

cases, styled *Covert* v. *Cross*, was tried in the Circuit Court of Jackson County, Missouri. An appeal was taken from the judgment in that case to the Missouri Supreme Court. Your petitioner thereupon filed a motion in the court below to postpone the hearing of the instant case until the Missouri Supreme Court should decide the companion case of *Covert* v. *Cross*. Said motion was overruled.

On June 8, 1959, the court below remanded this case to the trial court for supplemental findings and conclusions of law. After such supplemental findings had been made and filed by the District Court, the court below entered its opinion and order of affirmance on September 2, 1959. Petitioner filed a motion for rehearing, pointing out that the case of *Covert* v. *Cross* was set for oral argument before the Missouri Supreme Court *en banc* on October 5, 1959, and requesting postponement of final decision in the instant case until the decision of the Missouri Supreme Court. Said motion for rehearing was overruled on September 22, 1959, although the court below did at said time modify its opinion and order of September 2d.

The companion case of *Covert* v. *Cross* was argued orally before the Missouri Supreme Court *en banc* on October 5, 1959, and is presently under advisement by said court.

REASONS FOR GRANTING THE WRIT

1. The court below rested its decision solely on the Missouri Blue Sky Law, expressly excluding any consideration of the Federal Securities Act (Appendix page A13). The validity and correctness of the decision below, therefore, depends entirely on whether it correctly interpreted the said Missouri statute.

There is presently pending before the Missouri Supreme Court the case of *Covert* v. *Cross*, No. 47,462, which is a companion case to the instant case and which involves the same documents and transactions as those which are involved here. The Covert case was argued orally before the Missouri Supreme Court *en banc* on October 5, 1959, and will be decided in a short time. Said decision by the Missouri Supreme Court *en banc* will constitute a final and definitive ruling by the highest court of Missouri on the various issues of state law which are being considered in that case as questions of first impression in Missouri. If the Missouri Supreme Court rules for petitioner in the Covert case, such decision will be binding on the Federal courts and should demand a reversal of the decision below.

2. The court below "was inclined to the view" and assumed that the Missouri Blue Sky Law does not apply to transactions between joint adventurers (Appendix, page A11). However, it held that respondent was not a party to a joint adventure because of the stipulation in the Joint Operating Agreement to the effect that the instrument was not to be construed as a joint venture or other relationship whereby any one party could be held liable for the acts of another party, and the stipulation in the letter of confirmation to the effect that the relationship of the parties should be that of "independent contractors."

This same issue is being presented to the Missouri Supreme Court in the case of *Covert* v. *Cross*, No. 47,462. It is significant that during the course of the oral argument of that case, Judge Storckman of the Missouri Supreme Court stated from the bench that he could not understand how the relationship between the various co-owners could be that of "independent contractors." This remark by Judge Storckman may forecast a ruling by the Missouri

Supreme Court sustaining our contention that said provisions in the letter of confirmation and in the Joint Operating Agreement were intended to apply only as between the Operator and the Non-Operators and were not intended to have any application as between the co-owner Non-Operators *inter se*. The decision on this point by the Missouri Supreme Court will, of course, be binding on the Federal courts.

Moreover, the ruling of the court below giving controlling importance to these stipulations is contrary to decisions of this Court and of the Missouri courts. It is established law in this Court that parties cannot change their true relationship by calling that relationship something else. Thus, for example, this Court held in *Herryford* v. *Davis*, 102 U.S. 235, l.c. 244-5:

> "* * * It is quite unmeaning for parties to a contract to say that it shall not amount to a sale, when it contains every element of a sale and transmission of ownership."

To like effect is *Union Pacific Ry. Co.* v. *Chi., R. I. & P. Ry. Co.*, 163 U.S. 564, l.c. 582; *Kolb* v. *Golden Rule Baking Co.*, 222 Mo. App. 1068, 9 S.W.2d 840, l.c. 842.

Still further, the opinion of the court below is essentially in conflict with the recent opinion of the United States Court of Appeals for the Tenth Circuit in *Woodward* v. *Wright*, 266 F.2d 108. In the Woodward case it was held that the plaintiffs could not recover under the Federal Securities Act, for their investment in non-registered fractional shares in an oil well, on the bare ground of non-registration. The essence of the decision was that the plaintiffs, Non-Operators, had the right to discharge the defendant as the Operator and, therefore, the defendant was not in "control" of the enterprise. In the instant case,

respondent and his co-investors had the same right of discharge that the plaintiffs had in the Woodward case. The basic reason for said conflict between the Court of Appeals for Eighth Circuit with that for the Tenth Circuit, is the opposing interpretations made by those courts of the opinion in *S.E.C. v. Howey Co.*, 328 U.S. 293.

3. If respondent is entitled to any recovery in this case at all, then the very important issue is posed of whether he is limited to the amount allocated by the agreement of the parties to acquisition of leasehold interests. On this issue there is a square-toed conflict between the court below and the Supreme Court of Illinois. The court below has ruled in *Whittaker v. Wall*, 226 F.2d 868, and in the instant case that no distinction should be recognized between acquisition cost and development expenses. In the case of *Hammer v. Sanders*, 8 Ill. 2d 414, 134 N.E.2d 509, cert. den. 352 U.S. 878, the Illinois Supreme Court ruled directly to the contrary and held that a distinction must be recognized between the cost of acquiring the security and the cost of development. This issue has never heretofore been passed upon by the Missouri Supreme Court but is squarely presented and will be decided in *Covert v. Cross*, No. 47,462.

4. The trial court in its supplemental findings dated August 13, 1959, ruled that respondent's purported tender did not comply with the requirements of Missouri law, holding in this respect:

> "It is the conclusion of the court that such tender was not sufficient under the statutes of Missouri, or under the Federal Securities Act." (App., p. A22).

This conclusion was proper and inevitable under the law of Missouri regarding the general subject of tender, as shown by the following Missouri decisions: *Long v.*

Greene County Abstract and Loan Co., 205 Mo. 158, 158 S.W. 305, l.c. 308-309; *Mendell* v. *Howard*, 200 Mo. App. 427, 208 S.W. 497, l.c. 498; *Landis* v. *Saxon*, 89 Mo. 375, 1 S.W. 359; *Knollenberg* v. *Nixon*, 171 Mo. 445, 72 S.W. 41; *McGuire* v. *Brockman*, 58 Mo. App. 307.

Nevertheless, the court below refused to accept said finding by the trial court and instead held that the Missouri decisions on the subject of tender generally are inapplicable since they are not specifically referable to the Blue Sky Law. The court below then proceeded to rule this case on the basis of non-Missouri decisions. We submit that said action by the court below was improper and that it should have applied the general Missouri law on what constitutes a sufficient tender. There is no reason to believe that the Missouri legislature intended a tender under the Blue Sky Law to be different or lesser in character than what is required of a tender in any other proceeding under Missouri law.

5. With respect to the defense of estoppel, the court below dismissed the issue with the summary statement that said defense was "without merit." (Appendix, page A17). If by this the court below meant that estoppel cannot be a defense to an action under the Blue Sky Law, then the court below is in conflict with the decision of the Missouri Supreme Court in *Gales* v. *Weldon*, 282 S.W.2d 522, l.c. 528. If the court below meant that estoppel was not supported by the evidence, then it is in conflict with the decisions in *DeLamar Mines* v. *Mackay*, 104 F.2d 271 (C.A. 9), and *Grabendike* v. *Adix*, 335 Mich. 128, 55 N.W.2d 761. If the court below meant that the defense of estoppel was not affirmatively pleaded, then the court has ignored the provisions of the Federal Rule of Civil Procedure 15 (b), which provides that the pleading shall be automatically conformed to evidence received without objection.

The issue of estoppel is presented in and will soon be ruled by the case of *Covert* v. *Cross*, now pending before the Missouri Supreme Court *en banc*.

CONCLUSION.

This case and the Covert case now pending under submission to the Missouri Supreme Court *en banc* are essentially two parts of a single proceeding. They involve the same transactions and the same documents. Accordingly, consideration of the instant petition should be deferred, if possible, until the Covert case is decided by the Missouri Supreme Court *en banc*. If the Missouri Supreme Court should sustain petitioner's contentions, then the decision below should be reversed summarily for the reason that the issues involved arise under a state statute and present questions of state law on which the decision of the highest court of Missouri is controlling. Petitioner will, of course, advise this court immediately of the decision by the Missouri Supreme Court in the Covert case just as soon as it is announced.

Respectfully submitted,

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT.

No. 16,092.

William B. Cross, Appellant,

vs.

M. R. Pasley, Appellee.

Appeal from the United States District Court for the Western District of Missouri.

[June 8, 1959.]

Solbert M. Wasserstrom (Bellemere & Bellemere were with him on the brief), for Appellant.

Albert Thomson (Davis, Thomson, Vandyke & Fairchild were with him on the brief), for Appellee.

Before GARDNER, Chief Judge, and VOGEL and MATTHES, Circuit Judges.

PER CURIAM.

In this diversity case, tried before the Court, William B. Cross, defendant below, appeals from a judgment in favor of appellee, plaintiff below, for $14,771.32, together with $1477.13 as attorney's fee, or a total sum of $16,248.45.

The complaint alleged that defendant made sales of certain securities to plaintiff in the state of Missouri, and that such sales were in violation of the Missouri Securities Law (see Chapter 409, R. S. Mo. 1949, particularly Section 409.24D) and the Federal Securities Act of 1933 (see Title 15 U.S.C.A., Sections 77e, 77l).

In urging a reversal of the judgment, defendant contends that the sales were not of the type proscribed by the Missouri Act because the parties (plaintiff, defendant and others) were engaged in a joint enterprise; that the transactions did not involve a public offering and therefore were exempt under §77d of the Federal Securities Act; and that plaintiff failed to make adequate tender.

Reluctantly, we conclude that the cause must be remanded to the trial court for additional findings of fact and conclusions of law. Rule 52 of the Federal Rules of Civil Procedure, Title 28, U.S.C.A., imposes the duty on the trial court, in actions tried without a jury, to "find the facts specially and state separately its conclusions of law thereon." However, the same rule makes unnecessary specific findings of fact and conclusions of law if the district court's opinion plainly states its findings and conclusions. See *Frank Adam Electric Co. v. Federal Electric Products Co.*, 8 Cir., 200 F.2d 210, cert. denied 72 S. Ct. 940, 345 U.S. 958, 97 L.Ed. 1378.

The purpose of Rule 52 is in part to aid appellate courts in their review of district court decisions. As stated by the Ninth Circuit, in *Irish v. United States*, 225 F.2d 3, 8, "[t]he findings should be so explicit as to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable it to determine the ground on which the trial court reached its decision." Here, the trial court did file a "Memorandum Opinion, Findings of Fact and Conclusions of Law." However, for reasons presently demonstrated, the findings are inadequate inasmuch as they do not furnish this Court with a clear understanding of the grounds upon which the district court based its decision. The opinion was prefaced with this statement: "Plaintiff instituted this suit against the

defendant to recover the sum of $14,771.32 together with reasonable attorney's fee, costs and interest, as the purchase price of an alleged sale of securities in violation of §409.020 (4), V.A.M.S., and Title 15, U.S.C.A., §77b(3), without registration, as required by §409.030, V.A.M.S., and Title 15, U.S.C.A., §77(e)." After briefly reviewing certain factual aspects of the case, the Court stated: "The question for determination is whether or not this type of transaction comes within the provision of the *Acts*. It is plaintiff's contention that they were securities within the meaning of the *statute*. It is defendant's contention that the money received by him was for acquiring interests in oil leases, and his proportionate part of the drilling expenses, and did not come within the provisions of the *Act*. It is also a further contention that the parties engaged in a joint venture, and, as such, were not within the provisions of the *Acts*." From the foregoing, and particularly the italicized words, we are unable to determine whether the court was considering the transactions as violative of the Missouri law, the federal act, or both. By and large the remainder of the memorandum opinion is devoted to a discussion of two cases decided by the Supreme Court of the United States[1] and a Missouri Supreme Court Opinion.[2]

Careful analysis of the opinion in its entirety fails to disclose findings as to these material elements: (1) Whether all of the transactions with plaintiff took place in Missouri. This was a controverted issue as recognized by the trial judge at the conclusion of the trial when he stated: "Now, I think those are the issues, gentlemen. We

1. *S.E.C.* v. *Howey Co.*, 328 U.S. 293; *S.E.C.* v. *Joiner Corp.*, 320 U.S. 344.

2. *Gales* v. *Weldon*, 282 S.W.2d 522.

do have some issue here as to whether or not I believe it was one of these transactions took place in Oklahoma or Kansas, or whatever it was, but to me, gentlemen, that doesn't present very much of a problem here." Since the Missouri Securities Law has no extra-territorial effect, *Gales* v. *Weldon*, Mo. Sup., 282 S.W.2d 522, 528, the necessity for a finding on this question becomes readily apparent; (2) Whether the sales and offerings by defendant were violative of the federal securities act, §§77b, 77d, 77e, 77l, Title 15, U.S.C.A., (3) Whether proper and sufficient tender was made as required by both acts. Title 15, Section 77l, U.S.C.A.; Section 409.240, V.A.M.S.

We are mindful that the allowance of an attorney's fee is indicative of a finding by the court that the transactions with plaintiff occurred in Missouri.[3] However, since this was a controverted issue on trial, we cannot escape the conclusion that the court should make an explicit finding on this question, for it is not the province of this Court to infer material facts.

Accordingly, the district court is hereby directed to make and enter additional and appropriate findings of fact and conclusions of law nunc pro tunc as of the date of the original findings, and that as so entered such additional findings and conclusions be certified to this court as a supplemental record. Jurisdiction is retained.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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3. The Federal Act, Title 15, §77l, U.S.C.A. does not authorize such an allowance, the recovery being limited to the consideration paid with interest thereon, or for damages if securities are no longer owned by person bringing action, whereas, the Missouri Statute, §409.240, V.A.M.S., permits recovery of reasonable attorney's fees.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT.

No. 16,092

William B. Cross, Appellant,

vs.

M. R. Pasley, Appellee.

Appeal from the United States District Court for the Western District of Missouri.

[September 2, 1959.]

Solbert M. Wasserstrom (Bellmere & Bellemere were with him on the brief) for Appellant.

Albert Thomson (Davis, Thomson, Vandyke & Fairchild were with him on the brief) for Appellee.

Before GARDNER, VOGEL, and MATTHES, Circuit Judges.

MATTHES, Circuit Judge.

In this action appellee, M. R. Pasley, plaintiff below, seeks to recover the amount paid by him for certain securities alleged to have been sold in violation of the Missouri Securities Law (commonly referred to as "Blue Sky Law"), Chapter 409, R.S.Mo. 1949, particularly § 409.240 [unless otherwise indicated, Missouri citations are to Vernon's Annotated Missouri Statutes], and the Federal Securities Act of 1933 (Title 15 U.S.C.A., §§ 77e, 77l). Trial of the case was commenced before a jury, but upon determination by the parties that the evidence presented no substantial dispute as to any material issue, the jury was

discharged, and the cause submitted to the court. From the judgment in favor of plaintiff for $14,771.32, the amount allegedly paid by him for the securities, together with $1,477.13 as attorney fees,[1] the defendant has prosecuted an appeal to this court.

Jurisdiction to determine whether the transactions were in violation of the Missouri Blue Sky Law is present because of diversity of citizenship and amount involved. As to the alleged federal violation, jurisdiction is reposed by Title 15, U.S.C.A., § 77v.

The basis for the judgment was a specific finding by the trial court that the sales and offerings were in violation of both the Missouri and Federal Acts, supra.[2] The defendant challenges the judgment, asserting in effect that the findings of the court are clearly erroneous. We first direct our attention to the Missouri statute. The defendant contends that the parties were engaged in a joint adventure, and that therefore their transactions were not within the contemplation of the Missouri statute.

The defendant's position makes necessary a summary of the pertinent facts giving rise to the litigation.

Defendant and one Keith Chasteen formed a partnership known as C & C Petroleum Company. Letterheads of this firm were styled:

"C and C Petroleum Company
Leases—Royalties—Production
Fairfax Building
W. B. Cross Kansas City 5, Missouri Keith Chasteen
Baltimore 1-8447"

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1. § 409.240 of Missouri statute provides for recovery of reasonable attorney fees.

2. By supplemental findings entered August 13, 1959, the trial court found that all transactions upon which the suit is based were consummated in the State of Missouri.

The partnership was formed for the purpose of discovering and producing oil. Defendant, or he and Chasteen, owned oil leases in Oklahoma and Kansas. In order to obtain funds to finance the drilling of wells the partnership entered upon the venture of selling interests in the oil leases. To accomplish and facilitate that objective the partnership made arrangements with one Frank E. Otey, a salesman, under which Otey was "to raise or help them raise money among various individuals to explore for oil and drill wells in connection therewith." Otey was not paid a salary, but worked on a commission of ten per cent (10%) of the total amount brought in from the sale of the interest, including drilling costs. Otey testified that he operated under no limitations with respect to prospective purchasers. In his words, "the man didn't have to be tall or short, or anything, in order to get in on these leases. Anybody who wanted to and whom I thought I could sell some of this drilling operation to, I would be interested in having them come in, because I would get my commission on that." It appears that Otey contacted 35 or 40 individuals and was successful in obtaining 30 or 35 as investors in the various leases. Apparently, defendant and Chasteen retained a full ¼ interest each in the leases and sales were made of 1/32 interests in the remaining ¾ interest. In each case, a separate charge was made for the actual leasehold interest, but as an integral part of the deal, each purchaser was required to put up a substantial sum at the same time for the cost of drilling test wells. Thereafter, each buyer agreed to pay his proportionate share of completion costs. The record also indicates that defendant and his partner did not put up any money toward the cost of drilling the test wells. This "free ride" was deemed compensation for their services as "operators." They did, however, share their proportionate cost of completing wells. So much for the generalities.

Plaintiff is one of the numerous individuals contacted by defendant or his representatives, who invested in the oil leases. Over a period of approximately 8 months, beginning in December, 1955, plaintiff invested a total of $15,141.79 in leases which yielded him a total return of $370.47. The last wells were drilled in August, 1956, and this suit was filed October 4, 1956. The amounts invested, and the interests acquired in different wells, are revealed by the following exhibit:

"PLAINTIFF'S EXHIBIT 1.

Summary.

Name of Well	Int.	Payments	Receipts
Thrasher #1	1/32)		
Meek #1	1/32)	$ 4,016.79	$370.47
Parker #1	1/32)		
Thrasher #2	1/32	150.00	
Meek #2	1/32	475.00	
Padgett	1/16	1,850.00	
Jones #2	1/16	3,300.00	
Jones #1	1/16	1,850.00	
Estate #1	1/16	3,500.00	
Total		$15,141.79	
		370.47	
		$14,771:32"	

The sale of the interest to plaintiff in each lease was confirmed by a letter from the partnership, and ultimately consummated by written assignment of the interest purchased. The confirmation letter in regard to the first three leases is typical of the others, which differed only in land descriptions and sums of money to be paid. It contained this language in part:

"This letter confirms our recent verbal agreement under which you have agreed to acquire and purchase, and we have agreed to assign or cause to be assigned to you, an undivided 1 32nd of the 7/8th working interest subject to its proportionate share of None of 7/8th overriding oil and gas royalty interests in the oil and gas mining lease on and covering all of the land described as [legal description follows].

"We agree to drill, or cause to be drilled, a test well for oil and gas at the drill site location described as Prescribed by geologist on each of three leases and agree that such wells shall be drilled to a depth sufficient to test the Mississippi Chat formation expected to be encountered to a depth of approximately 2000 feet, unless oil or gas in paying quantities, or granite, or other impenetrable substance is encountered at a lesser depth. For the drilling of this test well we agree to dig the pits and celler and to furnish all of the labor, water, materials, machinery, and supplies necessary or convenient for the drilling of the well to the above depth.

"Yourself and your representatives shall be entitled to free access to the derrick floor at all times, at your risk, and you shall be given all available information with reference to the depth and condition of the well and the formations encountered during the drilling of the same.

"As full compensation to us for your interest in said lease you agree to make payment to us of the sum of $225.00, and as compensation for your share of the cost in connection with drilling the three test wells hereinbefore mentioned you agree to make payment to us of the sum of $2,025.00 for your proportionate part of contract as above mentioned.

* * * * * * *

"It is agreed that our respective rights and obligations hereunder are those of independent contractors, and nothing herein contained shall be deemed to cre-

ate any relation of mining or other partnership as between us, * * *."

Also material to one of the issues are the following portions of the more formal operating agreement entered into between the partnership as "Operator," and a number of the investors, designated in the agreement as "Non-Operator":

> "It Is Further Agreed by the parties hereto that C & C Petroleum Company, shall be the 'Operator' of the above described lease and shall have the active supervision thereof to the extent and for the purpose set out in Exhibit 'A'."
>
> * * * * * * *
>
> "Operator shall have full and complete control and subject to the terms hereof, shall conduct and manage the operation and development of said leases for the production of oil and gas, or either of them for the joint account of Operator and Non-Operator."
>
> * * * * * * *
>
> "It is not the purpose or intention of this instrument to create, and this agreement shall never be construed as creating, a joint venture, mining partnership or other relationship whereby any party shall be held liable for the acts, either or omission or commission, of any other party or parties hereto."

Concededly the interests in the leases were not registered as required by the Missouri Act. Neither does defendant question that such interests constituted securities as defined by § 409.020 (3). Thus the basic issue is delineated to the rather narrow question of whether the transactions are exempted from operation of the law.

While § 409.040 exempts certain *securities*, and § 409.050 exempts certain *transactions*, it is clear that transactions between joint adventurers do not fall within the categories

or classifications enumerated therein. Defendant does not premise his contention on the statute, but rather argues that from the teachings of the courts and other recognized authorities, the question has been put to rest, and that transactions between joint adventurers are not proscribed by Blue Sky Laws. He cites, among others, such cases as *Hammer* v. *Sanders*, 8 Ill. 2d 414, 134 N.E.2d 509, cert. den. 352 U.S. 878; *Campbell* v. *Degenther*, (W.D.Pa.) 97 F. Supp. 975; *Brown* v. *Cole*, 155 Tex. 624, 291 S.W.2d 704; *Lindemulder* v. *Shoup*, 258 Mich. 679, 242 N.W. 807; and 53 C.J.S., Licenses, § 75, p. 764.[3] The question has not, to our knowledge, been ruled on by the Supreme Court of Missouri, although it was raised and presented to that Court in *Gales* v. *Weldon*, 282 S.W.2d 522. Defendant construes the language of the Court in that case as making "it quite plain that the Missouri Supreme Court will, in an appropriate case, hold that the Missouri Blue Sky Law does not apply to joint adventures." Because of the very nature of a joint adventure, and the relationship of the parties engaged therein, we are inclined to the view that the Missouri statute is not designed or intended to cover transactions between joint adventurers or partners. However, we do not attempt to forecast how the Missouri Supreme Court will rule if called upon to do so, neither are we required to make an independent determination of the question. This for the simple reason that, as in *Gales*, *supra*, we are of the opinion that there is no evidentiary

3. We do not understand the *Hammer* and *Campbell* cases as being ruled upon a finding that parties were engaged in a joint adventure. In the *Brown* case, the court by dictum observed that the Texas Act does not apply to joint adventurers, but ruled that parties there were not joint adventurers. In the *Lindemulder* action, it was ruled that 10 men, each contributing $500 to purchase an oil lease, were engaged in a joint venture and such a venture was exempt from the Michigan statute.

basis for holding that plaintiff was a party to a joint adventure, and that the transactions in question were between joint adventurers.

While we recognize that agreements concerning drilling operations may at times result in a relationship of joint adventure, 24 Am. Jur., Gas and Oil, § 105, it is elementary that such a relationship can arise only where the parties intend to so associate themselves. See 30 Am. Jur., Joint Adventures, § 8.

The factors and elements generally required to bring a joint adventure into existence are clearly pointed up in *Gales* at p. 527:

> "A 'joint adventure' is founded entirely on contract, either express or implied. It can exist only by the voluntary agreement of the parties to it. It has been defined as 'an association of persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill, and knowledge.' 48 C.J.S., Joint Adventures, § 1a. It is in the nature of a partnership, generally governed by the same rules of law, the principal difference being that a joint adventure is usually limited to a single transaction. As a general rule, in order to constitute a joint adventure, there must be a community of interest in the accomplishment of a common purpose, a mutual right of control, a right to share in the profits and a duty to share in such losses as may be sustained. 48 C.J.S., Joint Adventures, § 2a."

Here, of vital importance is the letter of confirmation and the operating agreement which expressly negate the theory of joint adventure, or partnership. The former stated that "nothing herein contained shall be deemed to create any relation of mining or other partnership as between us, • • •" and the latter provided that "• • • this agreement shall never be construed as creating a joint

venture, mining partnership or other relationship whereby any party shall be liable for the acts either o[f] omission or commission of any other party or parties hereto." Furthermore, we do not view the facts and circumstances as creating a relationship formed for the purpose of carrying out a single business enterprise or a single transaction. Indeed, the record compels the conclusion that the defendant embarked upon a rather extensive enterprise to discover and produce oil; the printed letterheads and statements of the partnership so indicate; a salesman was engaged who was given carte blanche authority to raise money by selling interests in oil leases, and the only thing required of a prospective purchaser was that he have the funds necessary to secure the interests. Mutuality of control is absent; the evidence supports the trial court's finding that "defendant had sole control over the drilling of the well, [and] although the holders of interests therein had a right to enter upon the premises to view the progress of the drilling, they had nothing to do with its supervision * * *."

Further elaboration of the facts before us is unnecessary. The conclusion is inescapable that the transactions under scrutiny constituted sales of securities proscribed by the Missouri Blue Sky Law, and the findings of the trial court to that effect are correct. Inasmuch as plaintiff is entitled to proceed under the Missouri statute, we deem it unnecessary to consider application of the Federal Securities Act.

We do have for consideration and disposition the contention that the plaintiff failed to make adequate tender of the assigned leasehold interests. Section 409.240 of the Missouri Act provides that the "person making such sale * * * shall be * * * liable to such purchaser in an action at law in any court of competent jurisdiction upon tender to

the seller in person or in open court of the securities sold or of the contract made for the full amount paid by such purchaser, together with all taxable court costs and reasonable attorney's fees in any action or tender under this section; * * *."

The tender was made in this manner. The complaint stated: "(t)he plaintiff tenders in court all of said securities and states that he has received $370.47 as income from said securities." In rendering judgment the court allowed credit for the amount of income received by plaintiff. At the close of the trial, plaintiff, through counsel made this statement: "Now, if the Court please, Mr. Pasley tenders back any interest he may have as required under the Missouri statute; any interest he may have he now tenders them to the defendant as required under our statutes." By supplemental findings, the trial court found that the tender was technically insufficient under the Missouri statute but stated: "However, the question was not raised by the defendant either during the trial or in his Motion for New Trial, and the first time it was called to the attention of the court was in Defendant's Supplemental Suggestions in support of his Motion for New Trial. It is the conclusion of the court that tender of the securities may be waived and that the defendant waived the statutory requirement for physical tender." Does the Missouri Securities Act require physical tender of the securities to the seller in person or in open court? The answer has not been supplied by the Missouri courts. In 53 C.J.S., Licenses, § 77, dealing with remedies for violations of Blue Sky Laws, this pronouncement is made at p. 782: "In order to entitle the purchaser to recover that with which he has parted, he must restore, or tender or offer to restore, that which he has received, unless restoration or a tender is excused." Louis Loss in his treatise

on *Securities Regulation*, states at p. 969: "The approach of the courts to the question of what constitutes good tender varies considerably." This is borne out by Anno., in 87 A.L.R. 42, at pp. 115-116. From our research it appears that the question has been resolved by a consideration of the attending facts in each case. While we believe the better practice to be that a physical tender of the securities should be made to the seller in person or in open court, we are persuaded to hold that the conduct of defendant throughout the proceeding renders impotent any complaint which goes to the form of the tender. The trial was focused upon the vital question of whether the transactions came within the statute. The tender as made in the complaint was not challenged, it was not questioned at any stage of the trial. When plaintiff renewed the tender at the close of the case defendant voiced no objection as to the sufficiency thereof. Upon conclusion of the introduction of the evidence, the trial judge expressed his opinion as to what issues were presented, which did not include the question of tender. If counsel for defendant entertained a contrary view he failed to make it known. In his motion for judgment or in the alternative for a new trial defendant failed to challenge the validity of the judgment because of an insufficient tender. All of this leads to the inescapable conclusion that defendant regarded the tender as sufficient and his claim to the contrary is without merit.

Defendant also complains of the amount of the judgment, asserting that in no event is plaintiff entitled to recover more than $715.00, said to be the amount paid for plaintiff's interests in the leases.[4] Defendant would dif-

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4. See Plaintiff's Exhibit 1, *supra*, p. A8.

Interests in Thrasher #1, Meek #1 and Parker #1 were initially purchased for $2,250—$225 of this amount being assigned as cost of the lease, and $2,025 as cost of test wells. An additional

ferentiate between that figure and the additional sums paid by plaintiff for drilling costs, contending that the drilling expenses were not a part of the "investment."

The Missouri statute, § 409.020 (3), defines the term "security" or "securities" to mean "any note; stock; * * * *investment contract;* * * * fractional undivided interest in oil, gas, or other mineral rights; * * * any certificate, contract, receipt or instrument whatsoever representing or constituting evidence of, or secured by, title to or interest in any oil, gas or mining lease, * * *" [Emphasis supplied]. It is to be observed that this definition is nearly identical to that found in the Federal Securities Act, Title 15, § 77 b (1), the difference being that the Missouri definition is more comprehensive. The answer to the instant question is found in *S.E.C.* v. *Howey Co.*, 328 U.S. 293. In that case each prospective customer was offered both a land sales contract and a service contract under which the Howey Company agreed to service citrus groves. Holding that an offering of units of the grove development coupled with a contract for cultivating, marketing and remitting the proceeds to the investors, was an offering of an "investment contract" within the meaning of the Securities Act, the Court stated at p. 298: "In other

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$1,766.79 was advanced later for purposes of making further tests, completion, and miscellaneous expenses.

Apparently "Thrasher #2" and "Meek #2" were covered under the original lease and the amounts of $150 and $475, respectively, were invoiced as "development" or "completion costs."

The Padgett lease was initially purchased at a cost of $85 for the lease, plus $765 for test wells, or for a total of $850. An additional sum of $1,000 was advanced for completion.

The Jones #2, Jones #1, and Estate #1 interests were purchased for an initial outlay of $1,800, $1,250, and $2,250, respectively. We cannot ascertain from the record in what manner these sums were allocated between lease cost and test drilling. The balance invested in these 3 leases covered completion costs, and other expenses.

words, an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise."

It is clear from the evidence, particularly the confirmation letters, that the total amount that plaintiff was required to pay, was the consideration for the "investment contract." The amount allocated to the cost of drilling the test wells was an integral part of the entire transaction,—it was paid at the same time and for the purpose of rendering more valuable the primary securities. In addition, plaintiff was obligated to pay for future drilling expenses. In *Whittaker* v. *Wall*, 226 F.2d 868, this court, in ruling that plaintiff was entitled to recover payments made for equipment and second wells, stated at p. 872: "It would be a perversion of the statute to allow remittances made in conjunction with a void and unlawful security to be exempt from restitution, and would permit unjust enrichment under the guise of statutory definition."

We have also considered defendant's contentions that plaintiff is barred by estoppel and laches, and that the court erred in refusing to permit him on the eve of trial to file a counterclaim, and find them without merit.

The judgment is

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT.

No. 16,092

William B. Cross, Appellant, vs. M. R. Pasley, Appellee.	}	Appeal from the United States District Court for the Western District of Missouri.

[September 22, 1959.]

ON PETITION FOR REHEARING.

Before GARDNER, VOGEL and MATTHES, Circuit Judges.

Per Curiam:

Defendant-Appellant has filed a petition in which he asks for a rehearing or in the alternative a modification of our opinion.

The petition for rehearing is denied. However, upon further consideration we now entertain the view that the judgment entered by the trial court should be modified or supplemented to require plaintiff to formally reassign or relinquish the interests conveyed to him in the oil leases. We adhere to our holding that under the circumstances presented by the record the defendant cannot escape liability to plaintiff because of the form of the tender. Neither can plaintiff, in view of the tender made by him, and the judgment in his favor, successfully assert that he retains or owns any right, title or interest in the securities in

question. Nevertheless, since the interests in the leases were conveyed by written instruments, at least one of which was duly recorded, plaintiff should by appropriate instrument, relinquish or reassign such interests in order to eliminate the possibility of a cloud being cast upon title to the real estate.

Accordingly, the judgment of the trial court is modified by adding thereto the following: "Plaintiff shall within thirty days from the date the mandate herein is filed in the District Court, execute and deliver to defendant a good and sufficient instrument whereby he shall fully and forever release and relinquish any right, title or interest acquired by him in the oil leases which are the subject of this action."

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

(Judgment.)

United States Court of Appeals

FOR THE EIGHTH CIRCUIT.

No. 16,092 - - - - September Term, 1958.

William B. Cross, Appellant,

vs.

M. R. Pasley.

Appeal from the United States District Court for the Western District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that this cause be, and the same is hereby, remanded to the said District Court with directions to make and enter additional and appropriate findings of fact and conclusions of law *nunc pro tunc* as of the date of the original findings, and that as so entered such additional findings and conclusions be certified to this Court as a supplemental record. Jurisdiction is retained.

June 8, 1959.

(Certified Copy of Additional Findings of Fact and Conclusions of Law of District Court.)

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Filed August 13, 1959.

M. R. Pasley, Plaintiff,

No. 10630 vs.

William B. Cross, Defendant.

In accordance with the mandate of the United States Court of Appeals directing this court to make additional findings and conclusions, *nunc pro tunc*, this court finds:

(1) That all of the transactions between the plaintiff and the defendant and upon which the suit was based, were entered into in the State of Missouri;

(2) That the sales and offerings by the defendant violated both the Missouri Securities Act and the Federal Securities Act;

(3) That the only tender made by the plaintiff of the securities which were the subject of the litigation, was in the complaint and by counsel for plaintiff at the close of the trial of the case, when he made the following statement:

"Mr Thomson: Now, if the Court please, Mr. Pasley tenders back any interest he may have as required under the Missouri statute; any interest he may

have he now tenders them to the defendant as required under our statutes."

No actual physical tender of the securities was ever made by the plaintiff to the defendant, nor were the securities deposited with the Court.

It is the conclusion of the court that such tender was not sufficient under the Statutes of Missouri, or under the Federal Securities Act. However, the question was not raised by the defendant either during the trial or in his Motion for New Trial, and the first time it was called to the attention of the court was in Defendant's Supplemental Suggestions in support of his Motion for New Trial.

It is the conclusion of the court that tender of the securities may be waived and that the defendant waived the statutory requirement for physical tender.

The plaintiff has suggested that the original Opinion of the court be corrected by changing the word "sold" to "sole" as it appears in the first line of the last paragraph on page 8 of the Record on file in the Court of Appeals. Very clearly this was a typographical error, and while it apparently is of no importance in a determination of the issues, the court does find that it was a typographical error and it is hereby corrected to "sole".

R. M. Duncan,
Chief Judge.

Dated August 13, 1959.

A true copy:

Attest: J. C. Truman,
Clerk.

by Paul H. Lilly, Deputy.
(Seal)

(Endorsed: Filed in U. S. Court of Appeals on August 17, 1959.)

(Judgment.)

United States Court of Appeals

FOR THE EIGHTH CIRCUIT.

No. 16092 - - - - September Term, 1958.

William B. Cross, Appellant,

vs.

M. R. Pasley.

Appeal from the United States District Court for the Western District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

September 2, 1959.

(Order Modifying Judgment of District Court and Denying Petition of Appellant for Rehearing, etc.)

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 16092 - - - - September Term, 1959.

William B. Cross, Appellant,

vs.

M. R. Pasley.

Appeal from the United States District Court for the Western District of Missouri.

The defendant-appellant in this cause having filed a petition for a rehearing, or in the alternative a modification of the opinion of this Court previously filed, and upon consideration thereof, It is now Here Ordered by this Court that the judgment of the trial court be modified by adding thereto the following:

> "Plaintiff shall within thirty days from the date the mandate herein is filed in the District Court, execute and deliver to defendant a good and sufficient instrument whereby he shall fully and forever release and relinquish any right, title or interest acquired by him in the oil leases which are the subject of this action."

And it is further Ordered by this Cou t that the petition for a rehearing, or in the alternative, a modification of the opinion of this Court, be, and is hereby, denied. Per Curiam opinion filed.

September 22, 1959.